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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 06 142 52354 Office: NEBRASKA SERVICE CENTER Date: FEB 25 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an information technology services business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's denial, the primary issue in this case is whether the petitioner has established that it will permanently employ the beneficiary on a full-time basis in the offered position. The AAO will also consider whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On the petition, the petitioner claims to have been established in 1993, employ approximately 250 workers, and earn approximately $15 million in annual sales.

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[1]Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. It is noted that, in response to the director's request for evidence, the petitioner indicated its desire to change the classification requested to that of a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). *See infra.*

On November 22, 2006, the director issued a request for evidence (RFE). The RFE instructed the petitioner to:

- Clarify whether the beneficiary will work in-house, or be contracted out. If the beneficiary will be contracted out, provide a copy of any contracts relating to where the beneficiary will, in fact, be working.

- Submit quarterly wage reports from the State of California Employment Development Department (EDD) for the last two quarters, and pay records for all employees hired after the submission of the most recent quarterly wage report.

- Submit federal tax returns and audited financial statements for 2003, 2004, and 2005.

- List of all petitions filed by the petitioner on behalf of other beneficiaries. The list must include the receipt number of each petition, the name and date of birth of each beneficiary. Further, for each beneficiary, the petitioner must establish its ability to pay the proffered wage.

- Clarify the employment-based immigrant visa category under which the petition is filed.

In response to the RFE, the petitioner submitted:

- Confirmation that the beneficiary "will be contracted to the field," and a copy of a one-page appendix to a contract between the petitioner and [redacted] The contract states that [redacted]. has a contract with [redacted], and that the petitioner will be contracting the beneficiary to [redacted], which, in turn, will be contracting the beneficiary to [redacted] Inc.

- Paystubs and 2005 Form W-2 issued to the beneficiary by the petitioner.

- Petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return states that the petitioner: is headquartered at [redacted] was established on March 10, 1993; earned $19,020,791.00 in gross sales and $222,962.00 in net income; paid $150,000.00 in officer compensation; had a payroll of $8,205,508.00; and had net current assets of $564,452.00.

- Quarterly wage reports for the first and second quarters of 2006 for California, Pennsylvania, District of Columbia, Florida, Connecticut, Washington, Oregon, Texas, Ohio, North Carolina, Arkansas, Illinois, Massachusetts, Virginia, Minnesota, New Jersey, Delaware, Michigan and Maryland. The submitted quarterly wage reports for the first quarter of 2006 indicate that the petitioner has approximately 87 employees.

- Confirmation that the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, and not an advanced degree

professional pursuant to section 203(b)(2) of the Act.

It is noted that the petitioner did not submit the requested information pertaining to petitions filed on behalf of other beneficiaries. Nor did the petitioner provide any evidence or explanation of its ability to pay each beneficiary, other than to state that it has over $19 million in sales, $222,962.00 in net income, and over 200 employees. The petitioner failed to provide a copy of its 2003 federal tax return. The petitioner did not submit pay records for all employees hired after the submission of the most recent quarterly wage report. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The appeal will be dismissed, and the petition denied, also for this reason.

Further, the petitioner claims to have 250 employees, yet the submitted quarterly wage reports for the first quarter of 2006 indicate that the petitioner only employs approximately 87 workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

On February 12, 2007, the director issued a notice of intent to deny the petition (NOID). The NOID states that the petitioner did not establish that the beneficiary will be employed in a permanent, full-time position. The director noted that prior petitions filed by the petitioner stated that it was a "temporary agency." The director also noted that the petitioner was contracting the beneficiary to a client who was again contracting him out to a third party. Finally, the director informed the petitioner that a search of public records indicate that its corporate status in the State of California had been suspended since 2003.

The petitioner's response to the NOID states that it has employed the beneficiary for over three years and he has been subcontracted to several end clients. The petitioner claims that the size of its operations, together with its history of employing the beneficiary, establishes that it will employ the beneficiary in a full-time permanent position. Regarding the suspension of its corporate status, the petitioner claims that it is incorporated in the State of New Jersey and is licensed to do business in California. The petitioner further states that a company with the same name was incorporated in California, but it is no longer an active business. The petitioner claims that it is still active and is the actual petitioner in the instant matter.

The NOID response included a certificate of status as a foreign corporation issued by the California Secretary of State on June 30, 2004. The certificate states that the petitioner has been registered as a foreign corporation with the state of California since July 16, 1996. The petitioner also attached

printouts from the State of California Secretary of State Business Entity website, http://kepler.sos.ca.gov/cbs.aspx, which indicate that it is an active corporation in the State of California and indicate that another corporation with its same name and almost identical address is no longer active.

On May 1, 2007, the director denied the petition. Citing 20 C.F.R. § 656.3 as defining "employment" as "permanent full-time work by an employee for an employer other than oneself," the director concluded that the petitioner failed to establish that it will permanently employ the beneficiary on a full-time basis in the offered position. The director stated that the beneficiary did not appear to be employed by the petitioner nor was there any evidence that he would be employed in the event a new client could not be found. Specifically, the decision states:

> The evidence does not indicate that the petitioner is actually offering a full-time job to the beneficiary, but rather is finding the beneficiary a job and collecting contract wages from the petitioner's client. There is no evidence for what duties the beneficiary would perform during the times in which a contract has not been found for the beneficiary or what duties the beneficiary performs during times between contracts.

The director also questioned the petitioner's explanation of its business operations in California, stating that the "contradictory evidence and statement throw into question the information provided with regard to the Service's inquiry on the matter." The director denied the petition accordingly.

On appeal, counsel claims that the petitioner is, in fact, offering the beneficiary a permanent position regardless of the duration of individual consulting projects. The appeal brief states:

> **The Petitioner categorically assures USCIS that it is the W2 employer that will provide FULL TIME YEAR ROUND EMPLPYMENT**[sic]**_ TO THE BENEFICIARY regardless of one project ending or another project commencing.**

(Emphasis in original). However, counsel provides no evidence in support of this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence in the record is sufficient to establish that the petitioner is a *bona fide* business with active corporate status in the State of California. Further, a current review of the State of California Secretary of State Business Entity website (http://kepler.sos.ca.gov/cbs.aspx, accessed February 3, 2010) confirms that the petitioner is still an active corporation in the State of California.

However, the petitioner has failed to establish that it will actually employ the beneficiary in the offered position. The fact that the petitioner contracts the beneficiary to another entity which, in

turn, subcontracts the beneficiary to a third party raises issues regarding whether the petitioner is and will be the beneficiary's actual "employer." The mere existence of paystubs or Forms W-2 do not necessarily mean that the beneficiary is or will be an employee of the petitioner. Other than unsupported statements of counsel and copies of the beneficiary's paystubs and Forms W-2, the petitioner has provided no evidence establishing that the beneficiary will, in fact, be employed, permanently or otherwise, by the petitioner. The contract between [redacted] and the petitioner only stipulates that the contractors will not be employees of [redacted] The petitioner has also provided no evidence that it will continue to pay the beneficiary during periods that there is no contract available. There is no evidence that the beneficiary will report to a manager employed by the petitioner; rather, it appears the beneficiary will report to, and be controlled by, the third party client. Once again, going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, the petition will be denied because the petitioner failed to submit evidence sufficient to establish that it will be an employer of the beneficiary.

Beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary is issued lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the July 7, 2005 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is $45,219 per year. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

The director noted that the petitioner has filed petition on behalf of multiple other beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date

of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. The director specifically requested this information from the petitioner, but the petitioner declined to provide it. The petitioner also failed to submit its 2003 tax return, even though this was specifically requested by the director. As explained above, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Although the petitioner has substantial operations, it has not established its ability to pay the proffered wage for the beneficiary and the proffered wages to the beneficiaries of the other petitions.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.